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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2268/2013*, **

Communication submitted by:	Danatar Durdyyev (represented by counsel, Shane H. Brady)
Alleged victim:	The author
State party:	Turkmenistan
Date of communication:	1 May 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 12 July 2013 (not issued in document form)
Date of adoption of Views:	17 October 2018
Subject matter:	Conscientious objection to compulsory military service
Procedural issue:	None
Substantive issue:	Freedom of conscience
Article of the Covenant:	18 (1)
Article of the Optional Protocol:	None

1. The author of the communication is Danatar Durdyyev, a national of Turkmenistan, born in 1993. He claims that the State party has violated his rights under article 18 (1) of the Covenant. The Optional Protocol entered into force for Turkmenistan on 1 August 1997. The author is represented by counsel, Shane H. Brady.

The facts as submitted by the author

2.1 The author submits that he is a Jehovah's Witness. He has never been charged with a criminal or administrative offence other than his criminal conviction as a conscientious objector.

* Adopted by the Committee at its 124th session (8 October–2 November 2018).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia V. J. Kran, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, José Manuel Santos Pais, Yuval Shany, Margo Waterval and Andreas Zimmermann.

2.2 On 7 June 2011, he was called up by the Military Commissariat to perform his compulsory military service. In compliance with the summons, he met with representatives of the Military Commissariat to whom he explained orally and in writing that, as a Jehovah's Witness, his religious beliefs did not permit him to perform military service. On an unspecified date, the author was charged under article 219 (1) of the Criminal Code of Turkmenistan[1] for refusing to perform his military service.

2.3 On 28 January 2013, the author was tried before the Kopetdagskiy District Court in Ashgabat. He explained that his religious beliefs as a Jehovah's Witness did not permit him to take up arms or to learn warfare, although he was willing to fulfil his civil obligations by performing alternative civilian service.[2] The Kopetdagskiy District Court convicted the author under article 219 (1) of the Criminal Code and ordered him to pay a fine of 6,000 manat (approximately $2,100).[3]

2.4 The author received a copy of the trial court decision only after eight days of persistent requests. On 8 February 2013, he filed a motion with the Ashgabat City Court to request a stay of enforcement of the trial court decision and to appeal it. Although not represented by a lawyer, the author indicated in his brief appeal that he did not agree with the decision of the Kopetdagskiy District Court.

2.5 On 14 February 2013, the Ashgabat City Court rejected the author's appeal. According to the Court, he "did not express dissatisfaction when appealing" against the trial court decision.

2.6 The author maintains that he has exhausted "all reasonable domestic remedies" concerning the alleged violation of article 18 (1) of the Covenant prior to filing his communication to the Committee.

2.7 In his additional submission of 19 September 2018, the author informed the Committee that he did eventually pay the fine of 6,000 manat and that, over the past four years, he has again been called up several times for military service. The matter, however, has not progressed beyond a summons when he refused to perform such service.

The complaint

3.1 The author claims that his prosecution and conviction for refusing to perform compulsory military service owing to his religious beliefs and conscientious objection have violated his rights under article 18 (1) of the Covenant.[4] He points out that he repeatedly informed the Turkmen authorities that he was willing to fulfil his civil duty by performing genuine alternative service. The State party's legislation does not, however, provide for such an alternative.

3.2 The author requests that the Committee direct the State party (a) to acquit him of the charges under article 219 (1) of the Criminal Code and expunge his criminal record, and (b) to compensate him for moral damages and his legal expenses, as required by article 2 (3) of the Covenant.

3.3 While he did eventually pay the fine of 6,000 manat, the author also stated in his initial submission of 1 May 2013 that it would be extremely difficult for him to pay the fine, which constituted a very large amount for many nationals of Turkmenistan. He noted in this context that he was unemployed and did not have any income.

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[1] According to article 219 (1) of the Criminal Code, failure to perform military service in the absence of legal grounds for exemption from such service is punishable by up to two years of correctional labour or imprisonment.

[2] The Military Service and Military Duty Act does not recognize a person's right to exercise conscientious objection to military service and does not provide for any alternative military service. For recommendations received by Turkmenistan with regard to the Act, see A/HRC/10/8/Add.4, para. 68 and CCPR/C/TKM/CO/2, para. 41.

[3] The Court took into account the author's young age and the fact that it was his first appearance before the court when it applied article 59 (1) (a) of the Criminal Code that allows for the imposition of a lesser punishment than the one provided for the criminal offence in question in the case of mitigating circumstances.

[4] See for example *Atasoy and Sarkut v. Turkey* (CCPR/C/104/D/1853-1854/2008), paras. 10.4–10.5.

State party's observations on admissibility and the merits

4. On 19 February 2015, the State party submitted its observations on the admissibility and merits of the communication. With regard to the facts, it stated that the author had been convicted on 28 January 2013 by the Kopetdagskiy District Court under article 219 (1) of the Criminal Code for having committed the criminal offence of evading the draft for military service, in the absence of legal grounds to be exempted from such a service,[5] and ordered to pay a fine of 6,000 manat.

Author's comments on the State party's observations

5.1 On 23 April 2015, the author submitted that, in its observations on admissibility and the merits, the State party had confirmed that he had been convicted under article 219 (1) of the Criminal Code for his conscientious objection to military service as a Jehovah's Witness and ordered to pay a fine. With reference to the Committee's Views in *Young-kwan Kim et al. v. Republic of Korea* (CCPR/C/112/D/2179/2012, paras. 7.3–7.4), the author requests that the Committee conclude that his prosecution and conviction under article 219 (1) of the Criminal Code have violated his rights under article 18 (1) of the Covenant.

5.2 The author also requests that the Committee direct the State party to provide him with an effective remedy giving full recognition to his rights under the Covenant, as required by article 2 (3) of the Covenant (see para. 3.2 above).

Issues and proceedings before the Committee

Considerations of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the case is admissible under the Optional Protocol.

6.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes the author's claim that he has exhausted all reasonable domestic remedies available to him. In the absence of any objection by the State party in that connection, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

6.4 The Committee considers that the author has sufficiently substantiated, for the purposes of admissibility, his claims under article 18 (1) of the Covenant. Accordingly, it declares them admissible and proceeds to their examination on the merits.

Consideration of the merits

7.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided under article 5 (1) of the Optional Protocol.

[5] According to article 18 of the Military Service and Military Duty Act, as amended on 25 September 2010, the following are exempted from military service: (1) citizens who have been declared unfit for military service for health reasons; (2) citizens who have already performed military service; (3) citizens who have performed military or another form of service in the armed forces of another State in accordance with international agreements entered into by Turkmenistan; (4) citizens who have been convicted twice of committing a minor crime or convicted of a crime of medium gravity, a grave crime or an especially grave crime; (5) citizens with an academic degree, approved in accordance with the legislation of Turkmenistan; (6) the sons or brothers of persons who have died as a result of carrying out military duties during military service or military training; and (7) the sons or brothers of those who, as a result of a disease contracted as a consequence of a wound or as a result of injury or contusion, have died within one year from the day of discharge from military service (after completion of military training) or of those who, as a result of performing military service, have become disabled during military service or military training.

7.2 The Committee notes the author's claim that his rights under article 18 (1) of the Covenant have been violated owing to the absence in the State party of an alternative to compulsory military service, as a result of which his refusal to perform military service because of his religious beliefs led to his criminal prosecution and subsequent conviction. The Committee takes note of the State party's submission that, in the absence of legal grounds for exemption from military service, the criminal offence committed by the author, evasion of the draft for military service, is punishable under article 219 (1) of the Criminal Code.

7.3 The Committee recalls its general comment No. 22 (1993) on the right to freedom of thought, conscience and religion, in which it considered that the fundamental character of the freedoms enshrined in article 18 (1) was reflected in the fact that that provision could not be derogated from, even in times of public emergency, as stated in article 4 (2) of the Covenant. The Committee recalls its prior jurisprudence according to which although the Covenant does not explicitly refer to a right of conscientious objection, such a right derives from article 18, inasmuch as the obligation to be involved in the use of lethal force may seriously conflict with the freedom of thought, conscience and religion.[6] The right to conscientious objection to military service inheres in the right to freedom of thought, conscience and religion. It entitles any individual to an exemption from compulsory military service if such service cannot be reconciled with that individual's religion or beliefs. The right must not be impaired by coercion. A State may, if it wishes, compel the objector to undertake a civilian alternative to military service, outside the military sphere and not under military command. The alternative service must not be of a punitive nature; it must be a real service to the community and compatible with respect for human rights.[7]

7.4 In the present case, the Committee notes that it is uncontested that the author's refusal to be drafted for compulsory military service derives from his religious beliefs. The Committee considers that the author's subsequent conviction and sentence amounted to an infringement of his freedom of thought, conscience and religion in breach of article 18 (1) of the Covenant. In this context, the Committee recalls that repression of the refusal to be drafted for compulsory military service, exercised against persons whose conscience or religion prohibits the use of arms, is incompatible with article 18 (1) of the Covenant.[8] It also recalls that, in its concluding observations on the State party's second periodic report, the Committee expressed its concern at the State party's continued failure to recognize the right to conscientious objection to compulsory military service and the repeated prosecution and imprisonment of Jehovah's Witnesses refusing to perform compulsory military service (CCPR/C/TKM/CO/2, para. 40).

7.5 The Committee recalls that it has dealt with similar cases in respect of the same laws and practices of the State party in a number of earlier communications, although in some of those cases the respective authors were sentenced to imprisonment and/or correctional

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[6] See *Yeo-Bum Yoon and Myung-Jin Choi v. Republic of Korea* (CCPR/C/88/D/1321-1322/2004), para. 8.3; *Jong-nam Kim et al. v. Republic of Korea* (CCPR/C/106/D/1786/2008), para. 7.3; *Atasoy and Sarkut v. Turkey*, paras. 10.4–10.5; *Young-kwan Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan* (CCPR/C/113/D/2218/2012), para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan* (CCPR/C/115/D/2221/2012), para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan* (CCPR/C/115/D/2222/2012), para. 7.5; *Sunnet Japparow v. Turkmenistan* (CCPR/C/115/D/2223/2012), para. 7.6; *Akmurad Nurjanov v. Turkmenistan* (CCPR/C/117/D/2225/2012 and Corr.1), para. 9.3; and *Shadurdy Uchetov v. Turkmenistan* (CCPR/C/117/D/2226/2012), para. 7.6.

[7] See *Min-Kyu Jeong et al. v. Republic of Korea* (CCPR/C/101/D/1642-1741/2007), para. 7.3; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.7; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.5; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.5; *Sunnet Japparow v. Turkmenistan*, para. 7.6; *Akmurad Nurjanov v. Turkmenistan*, para. 9.3; and *Shadurdy Uchetov v. Turkmenistan*, para. 7.6.

[8] See *Min-Kyu Jeong et al. v. Republic of Korea*, para. 7.4; *Jong-nam Kim et al. v. Republic of Korea*, para. 7.5; *Atasoy and Sarkut v. Turkey*, paras. 10.4–10.5; *Young-kwan Kim et al. v. Republic of Korea*, para. 7.4; *Abdullayev v. Turkmenistan*, para. 7.8; *Mahmud Hudaybergenov v. Turkmenistan*, para. 7.6; *Ahmet Hudaybergenov v. Turkmenistan*, para. 7.6; *Sunnet Japparow v. Turkmenistan*, para. 7.7; *Akmurad Nurjanov v. Turkmenistan*, para. 9.4; and *Shadurdy Uchetov v. Turkmenistan*, para. 7.7.

labour without the option of a fine.[9] In the present case, the Committee finds that, by prosecuting and convicting the author for his refusal to perform compulsory military service due to his religious beliefs and conscientious objection, the State party has violated his rights under article 18 (1) of the Covenant.

8. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation of the author's rights under article 18 (1) of the Covenant.

9. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated, inter alia, to expunge the author's criminal record, to provide him with adequate compensation and to refrain from calling him up for military service again without providing for an option to undertake alternative civilian service. The State party is also under an obligation to avoid similar violations of the Covenant in the future. In this connection, the Committee reiterates that, in accordance with its obligation under article 2 (2) of the Covenant, the State party should review its legislation with a view to ensuring the effective guarantee of the right to conscientious objection under article 18 (1) of the Covenant, for instance, by providing for the possibility of alternative service of a civilian nature.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official language of the State party.

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[9] See for example *Abdullayev v. Turkmenistan*, *Mahmud Hudaybergenov v. Turkmenistan*, *Ahmet Hudaybergenov v. Turkmenistan*, *Sunnet Japparow v. Turkmenistan*, *Akmurad Nurjanov v. Turkmenistan*, *Shadurdy Uchetov v. Turkmenistan* and *Navruz Nasyrlayev v. Turkmenistan* (CCPR/C/117/D/2219/2012).